

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN:

**ASSOCIATION OF PROFESSORS OF THE
UNIVERSITY OF OTTAWA (APUO)**

**Applicant
(Responding Party)**

and

UNIVERSITY OF OTTAWA

**Respondent
(Moving Party)**

**FACTUM OF THE MOVING PARTY
(Motion to Strike)**

EMOND HARNDEN LLP

Barristers and Solicitors
Glebe Chambers
707 Bank Street
Ottawa, Ontario K1S 3V1

Lynn Harnden (LSUC #: 16421R)
Céline Delorme (LSUC#: 54880U)

Tel: 613-563-7660
Fax: 613-563-8001

**Lawyers for the Respondent
(Moving Party),
University of Ottawa**

TO: **NELLIGAN O'BRIEN PAYNE LLP**
Lawyers/Patent and Trademark Agents
50 O'Connor Street, Suite 1500
Ottawa, Ontario K1P 6L2

Sean McGee (LSUC #: 24785M)

Tel: 613-231-8232

Fax: 613-788-3665

E-mail: sean.mcgee@nelligan.ca

Lawyers for the Applicant (Responding Party)

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**FACTUM OF THE RESPONDENT (MOVING PARTY)
UNIVERSITY OF OTTAWA**

PART I – OVERVIEW

1. The Association of Professors of the University of Ottawa (“APUO”) has filed an application for judicial review seeking to have the award of Arbitrator Foisy, dated January 27, 2014, set aside on a number of grounds. In support of its application for judicial review, the APUO filed the affidavit of Natasha Udell (“Udell Affidavit”). The University of Ottawa (the “University”) has brought this motion for an Order striking the Udell Affidavit as inadmissible as it does not meet the criteria set out in the *Judicial Review Procedure Act* (“JRPA”) or the decision of the Ontario Court of Appeal in the leading decision in *Keeprite Workers’ Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d)

513, 114 D.L.R. (3d) 162 (C.A.) [*“Keeprite”*] governing the admissibility of affidavit evidence in support of an application for judicial review.

PART II – FACTS

2. On January 27, 2014, Arbitrator Claude H. Foisy rendered a 32-page award dismissing two (2) of three (3) grievances filed by the APUO concerning Professor Denis Rancourt.

Decision of Arbitrator Foisy dated January 27, 2014, Moving Party’s Motion Record, Tab 4.

3. The first grievance (G-14) related to a letter of reprimand dated November 20, 2007 for not having taught the content of the approved course SCI 1101: Science in Society/La science dans la société. This grievance was allowed and the University was ordered to strike any mention of the letter of reprimand from the Professor Rancourt’s record.

Decision of Arbitrator Foisy dated January 27, 2014, page 2, Moving Party’s Motion Record, Tab 4, page 39.

4. The second grievance (G-15) related to a letter of reprimand dated November 22, 2007 for having violated Article 21.1.2 (c) of the Collective Agreement, which requires professors to provide an objective evaluation of students’ performance, in relation to course PHY 1722 (Principe de Physique II) in the winter of 2007. This grievance was denied and the letter of reprimand was to remain in Professor Rancourt’s record.

Decision of Arbitrator Foisy dated January 27, 2014, page 2, Moving Party's Motion Record, Tab 4, page 39.

5. The third grievance (G-24) related to the termination of Professor Rancourt on March 31, 2009 by the Executive of the Board of Governors, following a recommendation of the Dean of the Faculty of Science outlining the reasons for the dismissal, which included not having graded his students objectively in the course PHY 4385 / 5100, in which all of his students were awarded an A+. This grievance was denied and Professor Rancourt's termination was upheld.

Decision of Arbitrator Foisy dated January 27, 2014, page 2, Moving Party's Motion Record, Tab 4, page 39.

6. By way of an Application for Judicial Review filed on May 7, 2014, the APUO sought to have the award of Arbitrator Foisy quashed on the following grounds:
 - a. The Arbitrator erred in law and/or came to an unreasonable conclusion when he failed to appropriately assess and apply the principles of academic freedom to the facts before him.
 - b. The Arbitrator also denied the Applicant natural justice and procedural fairness, and erred in law by inappropriately relying on a report prepared by Ms. Maureen Robinson. This report allegedly summarized Professor Rancourt's public statements and appearances concerning his grading scheme.
 - c. The Arbitrator denied the Applicant natural justice and procedural fairness, and erred in law by refusing or failing to consider the testimony of Dr. André

Lalonde, Dean of the Faculty of Science, confirming the parameters of Professor Rancourt's grading.

- d. The Arbitrator made an unreasonable finding of fact when he determined that Professor Rancourt awarded each student a grade of A+ on the first day of class in the absence of any evaluation.
- e. The Arbitrator acted unreasonably when he determined that the actions of Professor Rancourt, a tenured, full professor at the University of Ottawa, should result in the termination of his employment.

Notice of Application filed by the APUO dated May 7, 2014, Moving Party's Motion Record, Tab 5.

- 7. In support of its application for judicial review, the APUO filed a 7-page (20 paragraph) affidavit sworn by Natasha Udell on April 30, 2014 (the "Udell Affidavit").

Affidavit of Natasha Udell, sworn the 30th day of April, 2014 ("Udell Affidavit"), Moving Party's Motion Record, Tab 3.

- 8. In support of its motion to strike the Udell Affidavit, the University has filed a 22-page (75 paragraph) affidavit sworn by Céline Delorme on November 3, 2014 ("Delorme Affidavit").

Affidavit of Céline Delorme, sworn the 3rd day of November, 2014 ("Delorme Affidavit"), Moving Party's Motion Record, Tab 2.

PART III - ISSUE

9. The sole issue raised by this motion is whether the Udell Affidavit is admissible in support of the APUO's application for judicial review.

PART IV – LAW AND ARGUMENT

10. Courts in Ontario have consistently held that affidavit evidence on an application for judicial review is admissible only to show a complete absence of evidence on an essential point or to disclose a breach of natural justice that cannot be proven by mere reference to the record.

Keeprite, supra para. 1, Moving Party's Book of Authorities, Tab A.

O.S.S.T.F. v. Thames Valley District School Board, [2004] O.J. No. 4784, 73 O.R. (3d) 590 ["*Thames Valley*"], Moving Party's Book of Authorities, Tab B.

Tembec Enterprises Inc. v. U.S.W., IWA Council 1-1000, 2009 CarswellOnt 3433, Moving Party's Book of Authorities, Tab C, paras. 26-28.

142445 Ontario Limited (Utilities Kingston) v International Brotherhood of Electrical Workers, Local 636 (2009), 251 O.A.C. 62 (Div. Ct.) ["*Utilities Kingston*"], Moving Party's Book of Authorities, Tab D.

Warren v. Ontario (Labour Relations Board), 2011 ONSC 5848, Moving Party's Book of Authorities, Tab E, paras. 8-10.

Metropolitan Toronto Apartment Builders Assn. v. Labourers' International Union of North America, Local 183, 2014 ONSC 4976, Moving Party's Book of Authorities, Tab F, paras. 13-14 and 16.

Professional Institute of the Public Service v. Unifor, Local 3011, 2015 ONSC 3748, Moving Party's Book of Authorities, Tab G, paras. 8-9.

11. The University submits that while the Application for judicial review filed by the APUO indicates that it is seeking to have the decision of Arbitrator Foisy quashed

on the basis of alleged errors of law and breaches of natural justice or procedural fairness, the statements of fact set out in the Udell Affidavit do not, in fact, relate to errors that are properly characterized as breaches of natural justice, procedural fairness or errors of law.

Notice of Application for Judicial Review, Moving Party's Motion Record, Tab 5.

12. In the University's submission, the Udell Affidavit contains statements directed at summarizing the evidence that was before Arbitrator Foisy with a view to challenging the consideration and weighing of the evidence by the Arbitrator. The University further submits that the Udell Affidavit selectively edits the testimony of various witnesses in an attempt to skew the testimony in favour of APUO, which inevitably leads to warring affidavits as to testimony before the Tribunal in respect of which there is no official transcript and no reference in the Foisy award.

Udell Affidavit, Moving Party's Motion Record, Tab 3.

Delorme Affidavit, Moving Party's Motion Record, Tab 2.

13. The record that goes before the court hearing an application for judicial review should be limited to the material that was before the Arbitrator and the award issued by him. Affidavit evidence which seeks to supplement testimony or representations already made before the Arbitrator, such as the Udell Affidavit, should not be admitted in an application for judicial review.

***Utilities Kingston, supra*, para. 10, Moving Party's Book of Authorities, Tab D, paras. 10-12.**

14. In the University's submission, the Udell Affidavit should be struck in its entirety as it does not meet the standard that has been established and consistently applied by the courts for admissibility of affidavits on an application for judicial review.
15. In the alternative, it is submitted that only those statements found in paragraphs 3, 4 and 6 of the Udell Affidavit relate to errors that might properly be characterized as breaches of natural justice or procedural fairness and, as such, might be considered as being admissible in support of an application for judicial review.

Governing Law

16. Section 2 of the *JRPA* sets out the grounds upon which judicial review is available in Ontario. Section 2(3) of the *JRPA* specifically empowers a court to set aside the decision of a tribunal that has made a finding of fact unsupported by any evidence.
17. Section 10 of the *JRPA* establishes the requirement for an administrative decision-maker who has been served with an application for judicial review in respect of one of its decisions, to file with the court its "record of proceedings".

Applicable jurisprudence

18. The leading decision on the admissibility of affidavit evidence in support of an application for judicial review in Ontario is the decision of the Ontario Court of Appeal in *Keeprite*.

Keeprite, supra para. 1, Moving Party's Book of Authorities, Tab A.

19. In *Keeprite*, the applicant sought to quash a decision of a labour arbitrator with respect to a grievance under the collective agreement on the basis that one of the arbitrator's key findings of fact was unsupported by any evidence. Because the evidence before the arbitrator in *Keeprite* had not been recorded, the applicant proposed to rely on affidavits to establish what evidence had been before the arbitrator. The respondent objected to the admissibility of the affidavit evidence, arguing that only the official record of the tribunal could be considered by the court pursuant to the relevant provisions of the *JRPA* and the *SPPA*.

Keeprite, supra para. 1, Moving Party's Book of Authorities, Tab A, paras. 1-4.

20. The Divisional Court allowed the affidavits to be admitted into evidence and, based on what was set out in the affidavits, quashed the arbitrator's decision. The respondent (employer) appealed to the Ontario Court of Appeal.

21. The Ontario Court of Appeal ruled that the affidavit evidence filed by the applicant in *Keeprite* was admissible to contradict the argument that one of the

arbitrator's key findings on an essential fact was unsupported by any evidence. After reviewing the affidavit evidence, however, the Court found that there was, in fact, evidence to support the arbitrator's findings. The appeal was allowed, the order of the Divisional Court was quashed and the application for judicial review was denied.

22. The following passage from the Court of Appeal's reasons in *Keeprite* has consistently been cited and relied upon by courts in Ontario considering the issue of admissibility of affidavits in judicial review proceedings:

Having just completed the exercise of examining, in this fashion, the evidence that was before the arbitrator I would express the view ... that the practice of admitting affidavits of this kind should be very exceptional, it being emphasized that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for the legitimate use of affidavit evidence to demonstrate the exacting jurisdictional test of a complete absence of evidence on an essential point would, indeed, be rare. [emphasis added]

Keeprite, supra para. 1, Moving Party's Book of Authorities, Tab A, para. 27.

23. The University submits that a key distinguishing factor between the present case and the facts in *Keeprite* is that the APUO does not allege in the present case that Arbitrator Foisy made any findings of fact on any essential point before him based on a complete lack of evidence. On that basis alone, the University submits that the APUO has failed to meet the "exacting jurisdictional test" required to establish the admissibility of the Udell Affidavit.

24. More recently, the Ontario Divisional Court considered the issue of admissibility of affidavit evidence in support of an application for judicial review in *Utilities Kingston*. The Divisional Court noted that the *Keeprite* standard for the admission of affidavit evidence on judicial review has been applied in numerous decisions involving labour boards and labour arbitrators, all of which confirm that affidavit evidence can only be admitted to show either an absence of any evidence on an essential point or to disclose a breach of natural justice that cannot be proven by a mere reference to the record.

Utilities Kingston, supra para. 10, Moving Party's Book of Authorities, Tab D, paras. 15-16.

25. The Divisional Court held that the decision in *Keeprite* was binding on it and confirmed that, on judicial review, factual findings will only be reviewed where there is no evidence to support them. In order to admit the affidavit evidence, the motions judge is required to determine (i) whether the affidavit material showed that there 'was no evidence to support a finding of fact'; and (ii) the evidence must relate to a fact that is essential to the decision."

Utilities Kingston, supra para. 10, Moving Party's Book of Authorities, Tab C, paras. 25-26 and 37.

26. The Divisional Court also acknowledged the policy considerations that favour continuing to follow the approach laid down in *Keeprite*. Notably, were a reviewing court to admit affidavits in support of applications for judicial review beyond the narrow bases recognized in *Keeprite*, this would: (i) create a

significant incentive for parties to seek judicial review in order to attempt to reframe the evidence that was before the arbitrator, resulting in a more prolonged and costly judicial review process; and (ii) place the reviewing court in the unfortunate position of trying to determine what evidence was before the Tribunal, which would be unfair to the administrative tribunal and undermine its role as a fact finder within a specialized area of expertise.

***Utilities Kingston*, supra para. 10, Moving Party's Book of Authorities, Tab D, paras. 31-33.**

27. The University submits that the Udell Affidavit is subject to the precise concerns identified by the Divisional Court in *Utilities Kingston*, insofar as it attempts to reframe and/or recreate the evidence that was before Arbitrator Foisy. As can be seen from the Delorme Affidavit filed on behalf of the University, if the Udell Affidavit is admitted, the reviewing court will be put in the unfortunate position of having to determine just exactly what evidence was before Arbitrator Foisy in order to decide whether the award was unreasonable.

Delorme Affidavit, Moving Party's Motion Record, Tab 2.

28. The University submits that the Udell Affidavit contains excerpts from testimony which do not accord with the transcript taken by representatives of the University of the same testimony.

Delorme Affidavit, Moving Party's Motion Record, Tab 2, para. 15.

29. In addition, throughout Professor Rancourt's testimony, he would often provide lengthy answers to counsel's questions and would often elaborate on his answers without any prompting by counsel. As a result, there is significant context missing from the depiction of the evidence in the Udell Affidavit.

Delorme Affidavit, Moving Party's Motion Record, Tab 2, para. 30.

30. For example, in paragraph 11 of the Udell Affidavit, she states that Professor Rancourt testified that his comments during the Queen's speech "were meant to arouse interest in his teaching methods and to push the limits. His goal was not to describe exactly what had happened in any class. Instead, he was attempting to be provocative and bring the concepts to life." While it may be that that was part of Professor Rancourt's testimony, the University submits that the fact that he also admitted in cross-examination that he did say those words and that he understood the document could give the wrong impression is significant context missing from the depiction of the evidence set out in the Udell Affidavit.

Udell Affidavit, Moving Party's Motion Record, Tab 3, para 11.

Delorme Affidavit, Moving Party's Motion Record, Tab 2, para 29.

31. As a further example, the Udell Affidavit states that Professor Rancourt testified that Maureen Robinson was hired by the University to spy on him. However, the Udell Affidavit fails to refer to other testimony contradicting Professor Rancourt's evidence in this regard – *i.e.*, evidence indicating that Ms. Robinson was hired as

an archivist to bring order to the voluminous documents that were starting to accumulate in the Dean's office.

Udell Affidavit, Moving Party's Motion Record, Tab 3, para 11.

Delorme Affidavit, Moving Party's Motion Record, Tab 2, para 29.

32. The Udell Affidavit also states that the Summary prepared by Ms. Robinson was admitted in evidence as an *aide memoire* for the Arbitrator and to put in context his notes on the questions asked of Professor Rancourt. However, the University's position is that the Summary was entered into evidence as an exhibit and the only condition to its admittance was that only the excerpts on which the witness was questioned would be considered by the Arbitrator. Contrary to the Udell Affidavit, the Delorme Affidavit contains the University's transcription of the Arbitrator's oral ruling on this issue.

Udell Affidavit, Moving Party's Motion Record, Tab 3, para 6.

Delorme Affidavit, Moving Party's Motion Record, Tab 2, paras 22 and 23.

33. Where an administrative tribunal's decision is based on findings of credibility, a reviewing court must "extend a high degree of deference" to those findings.

***Thames Valley, supra* para. 10. Moving Party's Book of Authorities, Tab B, paras. 3-4.**

34. The University submits that the award of Arbitrator Foisy reflects a thorough examination of all of the issues raised by the parties at the hearing, and the evidence presented, including issues going to the credibility of witnesses. As in

Thames Valley, it is submitted that there was ample evidence before Arbitrator Foisy upon which he could reasonably arrive at the findings of fact which he did.

Award of Arbitrator Foisy, Moving Party's Motion Record, Tab 4.

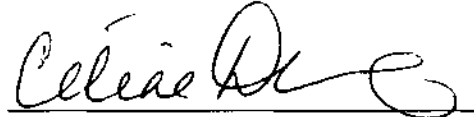
35. The University therefore submits that the Udell Affidavit is inadmissible.

PART V – ORDER SOUGHT

36. For the reasons set out above, the University seeks:

- (i) an Order striking the Udell Affidavit in its entirety; or
- (ii) in the alternative, an Order striking paragraphs 5 and 7 through 28 (inclusive) of the Udell Affidavit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September, 2015



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Barristers and Solicitors
Glebe Chambers
707 Bank Street
Ottawa, Ontario K1S 3V1

Lynn Harnden (LSUC #: 16421R)
Céline Delorme (LSUC#: 54880U)

Tel: 613-563-7660
Fax: 613-563-8001

Lawyers for the Respondent
(Moving Party),
University of Ottawa

TO: NELLIGAN O'BRIEN PAYNE LLP
Lawyers/Patent and Trademark Agents
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Ottawa, Ontario K1P 6L2

Sean McGee (LSUC #: 24785M)

Tel: 613-231-8232

Fax: 613-788-3665

Lawyers for the Applicant (Responding Party)
APUO

SCHEDULE "A"

List of Authorities

142445 Ontario Limited (Utilities Kingston) v International Brotherhood of Electrical Workers, Local 636, 2009 CanLII 24643 (ON SCDC).

Keeprite Workers' Independent Union v. Keeprite Products Ltd. (1980), 29 O.R. (2d) 513, 114 D.L.R. (3d) 162 (C.A.).

Metropolitan Toronto Apartment Builders Assn. v. Labourers' International Union of North America, Local 183, 2014 ONSC 4976.

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Warren v. Ontario (Labour Relations Board), 2011 ONSC 5848.

SCHEDULE "B"

Statutes and Regulations

Judicial Review Procedure Act, R.S.O. 1990, c.1 ("JRPA")

2. (3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review

10. When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

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Lynn Harnden (LSUC #: 16421R)
Céline Delorme (LSUC#: 54880U)

Tel: 613-563-7660
Fax: 613-563-8001

**Lawyers for the Respondent
(Moving Party)**

Box 133